STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Charmer Water Company, Cherry Hill Water Company, Clarendon Water Company, Killarney Water Company, Ferson Creek Utilities Company, Harbor Ridge Utilities, Inc. Proposed Increase in Water and Sewer Rates	)	Docket Nos. 11-0561 through 11-0566 (cons.) on Rehearing

INITIAL BRIEF ON REHEARING OF

THE PEOPLE OF THE STATE OF ILLINOIS

The People of the State of Illinois

By LISA MADIGAN, Attorney General

Susan L. Satter
Senior Assistant Attorney General
Timothy S. O'Brien
Assistant Attorney General
Public Utilities Bureau
100 West Randolph Street, Floor 11
Chicago, Illinois 60601
Telephone: (312) 814-1104 (Satter)
Telephone: (312) 814-7203 (O'Brien)
Fax: (312) 814-3212
Email: ssatter@atg.state.il.us
Email: tsobrien@atg.state.il.us

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The People of the State of Illinois, by and through Lisa Madigan, Attorney General of the State of Illinois ("the People" or the "AG"), pursuant to Part 200.800 of the Rules of Practice of the Illinois Commerce Commission ("the Commission"), 83 Ill. Admin. Code Part 200.800 and the schedule established by the Administrative Law Judge, hereby file their Initial Brief in the rehearing of the above-captioned proceeding.

I. INTRODUCTION

Charmar Water Company ("Charmar"), Cherry Hill Water Company ("Cherry Hill"), Clarendon Water Company ("Clarendon"), Killarney Water Co. ("Killarney"), Ferson Creek Utilities Company ("Ferson") and Harbor Ridge Utilities, Inc. ("Harbor") (collectively "the Companies") provide water service to customers that range in numbers from as little as 53 to as many as only 375 customers in Northern Illinois. The Companies are wholly-owned subsidiaries of Utilities Inc. ("UI"), which owns and operates water and/or wastewater systems throughout the United States.

On June 29, 2011, the Companies filed tariff sheets proposing general increases in water and sewer rates. The Companies, the Staff and the People of the State of Illinois submitted testimony, and the Commission entered its Final Order in this docket on May 22, 2012 ("Final Order"). Increases ranged from 189.65% for Charmar to 70.47% for Ferson Creek (Sewer Operations). Final Order, Appendix A, Appendix D.

In its Final Order, the Commission allowed recovery of nearly all[1] of the Companies' requested external rate case expenses. ICC Docket 11-0561, Final Order at 19 (May 22, 2012). The costs related to outside legal services, customer notices, Fed Ex, mailings, postage, and miscellaneous costs, and travel were included in rates. See page 9 of each Appendix attached to the Final Order. However, the Commission denied recovery of *internal* rate case expense on the grounds that the Companies "failed to provide the record necessary for the Commission to exercise its discretion under Section 9-229 of the [Public Utilities] Act and determine what would have been reasonable expenditures for this litigation." Final Order at 20.

The Commission further concluded that:

> "If a utility seeks to avail itself of Section 9-229 of the Act and recover its rate case expenses from ratepayers, it is axiomatic that it must provide the Commission with sufficient detail regarding what actual expenses were incurred, by whom, for what purpose, and why such expenses were necessary. Absent such detail, it is impossible for the Commission to make an informed determination regarding the justness and reasonableness of recovering such expenses from ratepayers. Expenses sought for recovery under Section 9-229 are not standard utility operating expenses; the Appellate Court has made clear that they must be treated akin to how a reviewing court would analyze a standard attorney fee petition, and the Commission analyzes them accordingly….
>
> [T]he Companies justification for these expenses is clearly insufficient in this case. Certain employees are cited as having spent an estimated 200 hours on this matter for an individual utility; others are estimated to have spent 350 hours.

[1] The Commission disallowed recovery of expenses related to SFIO Consulting.

> There is no information provided on what exactly these employees were doing; only two such employees are testifying witnesses in this matter, and while others are referenced in filings and data request responses, there is no indication how any of their time was specifically spent. It is simply impossible for the Commission to judge the value of zero, 200, 500, or even 1000 hours of these employees' alleged time spent on this matter and how essential that work was to its rate case. Given that these rate case labor expenses alone create burdens of hundreds and even thousands of dollars for individual customers, such documentation is essential in this proceeding.
>
> A focus of the parties has been on the issue of "double-counting" – whether test year labor costs were properly reduced to account for rate case expense, and not counted as both test year labor costs and rate case expense. While the Commission is mindful of this concern, our threshold inquiry under Section 9-229 of the Act is simply whether labor hours accounted for as rate case expense are properly detailed justified such that the Commission may make a determination regarding their justness and reasonableness. The Commission cannot make an informed judgment regarding that initial "single"-counting of these labor expenses, as that information is not in the record.

Final Order at 19-20. The Commission relied, in part, on the decision in *People ex rel Madigan v. Illinois Commerce Commission,* 2011 IL App (1st) 011776, 964 N.E. 2d 510 (December 9, 2011), which remanded the rate case expense findings of the Commission in a 2009 water rate case because the Commission's Order "lacked sufficient detail to comply with" Section 9-229 (220 ILCS 5/9-229). *Id*. at ¶50. In declining to include internal rate case expense in the revenue requirement the Commission noted that its "primary concern is proper application of the law to the factual record in this case." Final Order at 18.

On June 21, 2012, the Companies filed an application for rehearing asking the Commission to reconsider its decision disallowing internal rate case expense. The Companies argued that the Commission had accepted the same type of evidence on internal rate case expenses in past proceedings, and asserted that the Commission had "on its own accord" changed the evidentiary standard without notice or opportunity to respond. Companies

Application for Rehearing at 4. The Companies relied on *Citizens Utilities*, 153 Ill.App.3d 28, 36 (3d Dist. 1987), for the proposition that "before the Commission can change the sort of evidence acceptable to support cost recovery, the utility 'must be adequately informed and allowed a reasonable amount of time' to present that evidence." Companies Application for Rehearing at 4, citing *Citizens Utilities*, 153 Ill.App.3d at 36.

The Commission granted rehearing by Notice dated July 12, 2012. In the Administrative Law Judge's ("ALJ") Memorandum on Rehearing, the ALJ recommended rehearing in order "to give the Companies an opportunity to provide more detail and evidence concerning its internal WSC labor rate case expenses." Docket No. 11-0561, ALJ's Memorandum to the Commission at 3 (filed on e-docket July 11, 2012).

Further discovery was had on rehearing, the Companies, Staff and the People submitted testimony and exhibits, and an evidentiary hearing occurred on October 2, 2012.

II. LEGAL FRAMEWORK AND STANDARDS

It is a fundamental principle of public utility regulation that costs included in a utility's regulated rates must be reasonable. 220 ILCS 5/9-101; 9-201(c)("the burden of proof to establish the justness and reasonableness of the proposed rates or other charges, classifications, contracts, practices, rules or regulations, in whole and in part, shall be upon the utility."). The Commission's authority to review those costs to ensure that they are reasonable is well established. While rate case expenses have always been subject to the reasonableness standard, (see *DuPage Utility Co. v. Illinois Commerce Comm'n*, 47 Ill. 2d 550, 553 (1971)), the General

Assembly amended the Public Utilities Act in 2009 to expressly direct the Commission to "specifically assess the justness and reasonableness" of rate case expenses (220 ILCS 5/9-229).

Section 9-229 of the Act provides:

> "The Commission shall specifically assess the justness and reasonableness of any amount expended by a public utility to compensate attorneys or technical experts to prepare and litigate a general rate case filing."

220 ILCS 5/9-229. The application of this section has been an issue in several recent rate cases, including Commonwealth Edison, ICC Docket 10-0467, Order at 66-70 (May 24, 2011), Peoples Gas, Light and Coke and North Shore Gas Co., ICC Docket 11-0280, 11-0281, Order at 71-77 (January 10, 2012), and Illinois American Water Company, ICC Docket 09-0319, Order at 72-80 (April 13, 2010). In the Commonwealth Edison Order, the Commission directed that a rulemaking be initiated to address rate case expense. ICC Docket 10-0467, Order at 86.

In December 2011, the Illinois Appellate Court addressed Section 9-229 and the Commission's duty to "specifically assess" recovery of a utility's expenses under section 9-229. In *People ex rel Madigan v. Illinois Commerce Commission* (*"Illinois American Water Company"*), 2011 IL App (1st) 101776, 964 N.E.2d 510 (December 9, 2011)[2], the Court rejected the Commission's treatment of a water utility's rate case expenses, finding there was insufficient detail to support a finding that the rate case expenses were reasonable and just. *Id.* at ¶50. The Court noted, in particular, that the documents submitted by the water utility did not detail tasks; rather they merely listed "generic" line items indicating how many hours were worked by an attorney on a case or a blanket "not to exceed" line item. *Id.* at ¶49. In addition to the

[2] The Company's Petition for Leave to Appeal was recently denied by the Illinois Supreme Court. *Illinois American Water Co. v. Illinois Commerce Comm'n*, 2012 IL 114314 (September 26, 2012).

insufficient evidence submitted by the utility, the Court noted that the Commission Order did not include a breakdown or details to show how the cost requested by the Company or the Staff's recommendation was reached. *Id.* The Court found that the Commission's "conclusion lacked sufficient detail to comply with the statute," and remanded for additional findings on the issue. *Id.* at ¶50.

The Court went on to direct the Commission to consider several factors in the assessment of whether recovery of section 9-229 costs is reasonable, noting that cases involving recovery of attorneys fees may provide guidance to the Commission. In such cases, the party seeking recovery must specify:

1) The services performed,
2) By whom they were performed,
3) The time expended, and
4) The hourly rate charged.

Id. at para. 51.

Once the these threshold facts are established, the Commission should then consider additional factors,

> "such as the skill and standing of the attorneys, the nature of the case, the novelty and/or difficulty of the issues and work involved, the importance of the matter, the degree of responsibility required, the usual and customary charges for comparable services, the benefit to the client, and whether there is a reasonable connection between the fees and the amount involved in the litigation."

Id. at para. 51, citing *Kaiser v. MEPC American Properties Inc.*, 164 Ill. App. 3d 655, 661, 518 N.E. 2d 424 (1987). This is the legal standard that the Commission must apply in this docket under Section 9-229, notwithstanding the Companies' prior interpretation of Section 9-229. *Illinois American Water Company*, 2011 IL App (1st) 101776 at ¶51.

III. THE COMMISSION ACTED PROPERLY IN DENYING RECOVERY OF INTERNAL RATE CASE EXPENSES WHEN THE RECORD WAS INSUFFICIENT UNDER SECTION 9-229.

In its Final Order, the Commission noted that "[t]he bulk of the Companies' rate case expenses consist of internal Water Service Company labor costs" and that "some internal employees spent hundreds and even thousands of hours of time for which compensation is sought for recovery under Section 9-229 of the Act." Final Order at 19. The Commission found the evidence provided in the original hearing "clearly insufficient," noting that there was "no information" as to "what exactly these employees were doing" and that "there is no indication how any of their time was specifically spent." *Id.* at 20. Applying the standard articulated in *Illinois American Water Company, supra*, the Commission properly concluded that this lack of information rendered it "simply impossible for the Commission to judge the value of zero, 200, 500, or even 1000 hours of these employees' alleged time spent on this matter and how essential that work was to its rate case." Final Order at 20. The Commission concluded that documentation of what the WSC employee did and for how many hours was "essential," particularly in light of the "burdens of hundreds and even thousands of dollars for individual customers." *Id.* at 19-20.

The internal rate case expenses the Companies seek are costs allocated from UI's Water Service Corporation ("WSC") to the Companies. The WSC manages all of UI's operations, including administration, engineering, accounting, billing, data processing, and regulatory services for the utilities. Final Order at 3. The same WSC employees whose salaries are allocated to the Companies perform rate case duties, and their time is allocated either directly or allocated based on the number of connections. The evidence of the WSC time directly allocated for rate case expense was found in Companies Exhibit 3.3, which was attached to the Rebuttal

Testimony of Lena Georgiev, and supplemented by Companies Exhibits 3.5, and 3.6. Companies Ex. 3.0 and 3.0 Supp. Companies Exhibit 3.3 contained the number of hours assigned to various WSC employees through October 31, 2011 for each of the six small companies.

Companies Exhibit 3.3 listed various WSC employees and the number of hours assigned to them prior to August 31, September 30, and October 31, 2011 for each company. On rehearing, People's witness Michael Brosch laid out the hours estimated by the Company and the "actual" hours as of October 31, 2011 as reported in Companies Exhibit 3.3.

Rate Case Labor Hours vs. Actual	***Estimated Hours***	***Actual at Oct. 31, 2011***	***Difference***
Charmar Water	1,390	471	919
Cherry Hill Water	1,390	578	812
Clarendon Water	1,390	518	872
Ferson Creek Water & Sewer	1,315	579	736
Harbor Ridge Water & Sewer	1,390	708	682
Killarney Water Company	1,390	707	683
Total Amounts	**8,265**	**3,561**	**4,704**

AG Exhibit 3.0 Rhg at 5, Table 2. This table shows that the Companies "actually" assigned less than half of the estimated hours through October 31, 2011. The Companies provided no new actual hourly information on rehearing.

While the listing of "actual" hours contained in Companies Exhibit 3.3 did not include a description of services provided for the hours listed, the total dates and number of hours are reported. A review of the sheer number of hours demonstrates the problem with the Companies'

time estimates. For example, one employee (Dhwani Mehta), claimed 169.6 hours from October, 2010 through December 31, 2010, which is six months before the June 29, 2011 filing. This represents more than 4 weeks of 40 hours each, assigned to four small companies. The Companies did not explain why so much time, so far in advance of the rate case filing, was assigned to these Companies, with the majority of time assigned to Clarendon, Ferson Creek, Harbor Ridge and Killarney. Ms. Mehta added another 333 hours (equalling 8.3 forty-hour weeks) for Cherry Hill, Clarendon, and Ferson Creek from January 1, 2011 to June 30, 2011. This is an enormous amount of time to prepare for the Companies' Direct Testimony (filed under someone else's name), that consisted of no more than 16 pages of text and five single page schedules (plus two pages of footnotes), a notice to customers of each utility, and revised tariffs.

This one employee's **12.3 forty-hour week**'s worth of time was only a portion of the time assigned to these Companies before filing. WSC employee Lowell Yap assigned 425.7 hours from March, 2011 through June 30, 2011 for two of the same Companies (Harbor Ridge, Killarney). Mr. Yap's pre-filing time for two utilities equals **10.6 forty-hour weeks**. These hours are in addition to Ms. Mehta's time for these two Companies the previous year, and the total amount of time is plainly excessive. Neither Ms. Mehta nor Mr. Yap filed testimony. The actual witness for one of the Companies (Charmar), Mr. Dmitry Neyzelman, logged 227 hours from January 1, 2011 to June 30, 2011, equaling 5.69 forty-hour weeks. Ms. Lena Georgiev, who filed direct testimony for the remaining five companies, billed 239 hours over the same period, or almost six forty-hour weeks. The number of hours for each of these individuals is extremely high, and all together they are clearly excessive and unreasonable.

Mr. Yap and Ms. Mehta continued to bill these small companies hundreds of hours after the initial filing. From July 1, 2011 through October 31, 2011, these two individuals assigned

424.5 and 326 hours respectively, for a total of 16 forty-hour weeks despite the fact that they were not witnesses. The number of hours claimed for other WSC employees are similarly in the hundreds of hours over a four month period (July 1, 2011 to October 31, 2011).[3] These hours were assigned with no description of the work done, raising questions about what work was actually done and whether it is properly treated as rate case expense.

In addition to the extremely large number of hours described above, Companies Exhibit 3.3 identified 3,561 hours but the Companies sought to include more than twice that amount – 8,265 hours – in rates. See AG Ex. 3.0 on Rehearing at 4. As the People's witness Brosch pointed out, if all of these hours were actually spent, there would have been four full time employees working on nothing else for 52 weeks. AG Ex. 3.0 Rhg at 3. This is just not reasonable for two pieces of direct testimony, one piece of rebuttal and supplemental testimony, and one piece of surrebuttal testimony.[4]

The sheer number of hours claimed by the Companies is not credible given the size of these Companies and the scope of each case. The Commission correctly concluded that it could not approve the requested internal rate case expense in the absence of any description of what was done for the literally thousands of hours claimed. As discussed below, no further evidence was submitted to justify these hours and the Commission correctly excluded the costs associated with the internal rate case expenses claimed by the Companies.

IV. THE COMMISSION SHOULD REJECT THE COMPANIES' REQUESTED RECOVERY FOR INTERNAL RATE CASE EXPENSES ON REHEARING

[3] Companies Exhibit 3.3 attributes 319 hours to Mr. Neyzelman, 374.5 hours to Ms. Georgiev, totaling another 17 forty-hour weeks.

[4] Mr. Neyzelman and Mr. Haas filed direct testimony, and Ms. Georgiev filed rebuttal and surrebuttal testimony. Ms. Georgiev subsequently adopted Mr. Neyzelman's testimony in the original hearing. ICC Docket 11-0561c., Tr. at 19. Ms. Georgiev filed direct and rebuttal testimony on rehearing.

The Companies asked for rehearing on the grounds that the Commission, without notice to the Companies or Staff, rejected evidence that had been acceptable to the Commission in past proceedings. The Companies' assert "before the Commission can change the sort of evidence acceptable to support cost recovery, the utility 'must be adequately informed and allowed a reasonable amount of time' to present that evidence." Companies Petition for Rehearing at 4 (citing *Citizens Utilities v. Illinois Commerce Commission,* 153 Il1.App.3d 28, 504 N.E.2d 1367 (3d Dist. 1987)). In response, the Commission accepted the ALJ's recommendation to grant rehearing in order to "to give the Companies an opportunity to provide more detail and evidence concerning its internal WSC labor rate case expenses." ALJ's Memorandum to the Commission at 3 (July 11, 2012).

The Commission should affirm its Final Order that rejected the Companies requested recovery of internal rate case expenses for three reasons. First, the Companies failed to provide additional or adequate description of the thousands of hours of services claimed, rendering it impossible to evaluate whether the hours billed to rate case expense were more appropriately considered ordinary WSC services. Second, the Companies did not modify their requested recovery, and the hours of internal rate case expense that the Companies seek to recover remain excessive. Third, the Companies failed to provide any testimony or exhibits to enable the Commission to address the issue of "double billing." A close review of the data in Companies Exhibit 3.3 and People's witness Brosch's testimony on rehearing confirm that the Commission made the right decision in finding that it had insufficient information to conduct a meaningful review.

The Commission explicitly told the Companies that the support provided for its requested recovery of internal rate case expense was lacking. Final Order at 20. The Commission then

granted rehearing in order to give the Companies an opportunity to provide such support. Memorandum to the Commission at 3 (July 11, 2012). The Companies, however, have failed to supplement the record with evidence describing what was done during the thousands of hours claimed as internal rate case expense. Instead, the Companies have chosen to argue that, because they have not had to produce such records in the past, they do not need to provide them now. Companies Ex. 2.0 Rhg. at 3; Companies Application for Rehearing at 4. The Companies' position ignores the requirements of Section 9-229 and the holding in *Illinois American Water Co*., 2011 IL App (1st) 101776, 964 N.E.2d 510 (December 9, 2011). As a result, notwithstanding the opportunity to supplement the record, the Companies have failed to provide evidence to justify the close to half a million dollars in internal rate case expense they seek to impose on fewer than 2,000 customers, and the Commission should affirm the conclusions adopted in the Final Order on May 22, 2012.

The People's witness Michael Brosch prepared a table demonstrating the Companies claimed internal rate case expenses, for each utility, at the following levels:

Rate Case WSC Labor from w/p [d]	***Est. Hours***	***Total Cost $***	***Average Hourly Rate***
Charmar Water	1,390	$ 79,339	$ 57.08
Cherry Hill Water	1,390	76,339	$ 54.92
Clarendon Water	1,390	76,339	$ 54.92
Ferson Creek Water & Sewer	1,315	73,135	$ 55.62
Harbor Ridge Water & Sewer	1,390	76,739	$ 55.21
Killarney Water Company	1,390	76,739	$ 55.21
Total Amounts	**8,265**	**$ 458,630**	**$ 55.49**

AG Ex. 3.0RH, Table 1. In addition to showing no economies of scale from presenting six companies at once, the number of hours per company equals more than 34 forty-hour weeks. The total hours claimed for internal WSC employees for these six small utilities effectively equates to four full time employees working on nothing else for 52 weeks – at a cost to ratepayers of nearly half a million dollars.[5] AG Ex. 3.0 RH at 3. This is simply excessive, and calls for explanation. Yet, the only explanation provided was a high-level description of the duties of each employee. Companies Ex. 2.1 on Rehearing. As an example, Mr. Yap, who, as noted above, billed over 400 hours in these cases, according to the Companies "assisted in preparation of certain rate case schedules; assisted in preparing of data requests and rebuttal hearings; attend[ed] public hearings." Companies Ex. 2.1 on Rehearing at 2. These high-level explanations do not justify the level of hours that the Companies are claiming.

In the Companies' direct testimony, Ms. Georgiev stated that "the nature of the information that the Companies provided to Staff to substantiate their internal rate case expense in these cases is identical to the information that had been previously provided to the Commission Staff in recently concluded rate cases where the rate case expense was approved by the Commission." Companies Ex. 1.0RH at 3. On rebuttal, Ms. Georgiev further elaborated that "[t]he crux of the Companies' application for rehearing was that it was unfair to deny the recovery of rate case expense based upon the lack of records that the Commission had not previously required the Companies to maintain." Companies Ex. 2.2RH at 5.

Despite the Companies' view that no additional information was necessary, the People asked the Company to provide additional detailed WSC labor cost supporting data. The Companies objected to the additional questions and did not produce the additional information.

[5] Assumes 2,080 hours per employees (52 weeks times 40 hours/week). If vacation, holiday, sick and other non-productive time is considered, the rate case hours included would be equivalent to more than four full-time employees for a year.

AG Ex. 3.0 Rhg at 5-6. The Companies did not even provide updated exhibits in the form of Companies Exhibits 3.3 to cover the period after October 31, 2011, although it is apparent that they had this kind of information for the 10 months prior to the filing of tariffs in this docket.

Taking the number of hours claimed by the Companies as internal rate case expense at face value, Mr. Brosch testified that the requested number of hours is unreasonable. AG Ex. 3.0 Rhg at 6. The WSC employees that bill the local utilities are internal employees who should be already familiar with the Company's books and records and with its rate case filing models and spreadsheet templates.[6] AG Ex. 3.0 Rhg at 4. Moreover, the scope of these rate cases was limited (compared to the larger utilities such as Illinois American Water Company or Ameren Utilities) and the hours estimated by the Companies appear to be overstated. *Id.*

People's witness Mr. Brosch also noted that the issue of excessive internal rate case expenses has arisen in other jurisdictions involving the Companies' sister affiliates. In Indiana, affiliates of the Companies had a two rate cases pending at the same that this docket was being litigated. The Indiana Office of Utility Consumer Counselor ("OUCC") submitted testimony in Indiana that, like here in Illinois, number of labor hours and internal rate case labor costs and the total proposed rate case expense for Indiana Water Services, Inc. ("IWSI") and for Water Service Company of Indiana ("WSCI") was "staggering."[7] AG Ex. 3.1, 3.2 3.3 RH. The large number of hours attributed to both Indiana and Illinois rate cases at the same time, and other Utilities,

[6] The Companies described the "Project Phoenix" in their Direct Testimony that is supposed "to improve the Company's ability to record and retrieve data" and make financial, accounting, regulatory and other functions more efficient. E.g., Companies Ex. 1.0 (CH) at 6-7. The number of hours claimed as internal rate case expense does not indicate efficient use of these expensive systems. (Total cost of JDE system $13,995,789. E.g., Companies Ex. 1.0 CH at 7.)

[7] Indiana Utility Regulatory Commission ("IURC") Cause Nos. 44097 and 44104.These materials are available on the Indiana Utility Regulatory Commission's web site at: https://myweb.in.gov/IURC/eds/Guest.aspx?tabid=28&dn=SEARCHDOCKETEDCASE

Inc. affiliate rate cases were pending in Illinois at the same time,[8] underscores Mr. Brosch's concern that the Companies may be double counting WSC hours in multiple jurisdictions and cases. AG Ex. 3.0 Rhg at 8-9.

Staff witness Dianna Hathhorn concurred that the support provided by the Companies on rehearing is insufficient to describe and justify its internal rate case expense. Ms. Hathhorn concluded that "the Companies have not provided sufficient additional evidence on the internal Water Service Corporation ("WSC") rate case expense costs to satisfy the concerns that the Commission expressed in its Order" and recommended "no changes to the revenue requirements adopted in the May 22, 2012 Order." Staff Ex. 17.0 at 2. In so concluding, Ms. Hathhorn noted that the Commission "*was clear in its Order* that it was not satisfied with the estimated hours per employee that the Companies presented in the original case to support its WSC costs." Staff Ex. 17.0 at 4 (italics added).

Ms. Hathhorn noted that on rehearing the Companies "simply provided a narrative description of what each employee's work on the case entailed." Staff Ex. 17.0 at 4-5. This narrative does not describe what was done or produced for the hours spent or the expenses incurred, which employee was responsible, or why the expenses are necessary. Staff Ex. 17.0 at 6. In essence, Ms. Hathhorn concluded that "the Commission expects more detail than what the Companies have provided in this rehearing phase to support the justness and reasonableness of the costs under Section 9-229 of the Public Utilities Act." Staff Ex. 17.0 at 5.

[8] During the period that hundreds of hours were assigned to these Companies, WSC employees were also involved in ICC Docket 11-0059/0141/0142, which was opened on January 20, 2011 and concluded on May 2, 2012. The lack of descriptions of the hours spent in these cases makes it impossible to trace hours to particular cases or duties, but the sheer number of hours raises questions about how many hours these employees could reasonably and accurately bill.

The Commission should affirm its disallowance of the Companies' requested internal rate case charges. The purpose of this rehearing is to allow the Companies with the opportunity to justify their claimed internal rate case expenses as just and reasonable. However, the only additional evidence submitted by the Companies on rehearing is Companies Exhibit 1.1, describing rate case duties. The Companies have failed to meet their burden to show that their requested internal rate case expenses are just and reasonable.

V. The Companies Reliance on *Citizens Utilities* Is Misplaced.

The Companies assert that the court decision in *Citizens Utilities v. Illinois Commerce Commission,* 153 Ill.App.3d 28, 36 (3d Dist. 1987), restricts the Commission's ability to apply Section 9-229 as mandated by the Court in *Illinois American Water Co*., 2011 IL App (1st) 101776. Companies Application for Rehearing at 3-4. This argument is without merit. First, it is well established that decisions of an appellate court presumptively apply retroactively to causes pending at the time they are announced. *Heastie v. Roberts*, 226 Ill. 2d 515, 535 (2007); *Miller v. Gupta*, 174 Ill. 2d 120, 128 (1996). Second,

> "Illinois courts have consistently held that 'decisions of the Commission are not *res judicata*.' The concept of public regulation requires that the Commission have power to deal freely with each situation that comes before it, regardless of how it may have dealt with a similar or even the same situation in a previous proceeding."

Commonwealth Edison Co. v. ICC, 405 Ill. App. 3d 389, 407-08 (2d Dist. 2010). The Companies are essentially asking the Commission to disregard a binding appellate decision (*Illinois American Water Co.*), misapply the principle of *res judicata,* and accept close to half a million dollars of expense for 2,000 customers without adequate support. The Companies arguments should be rejected.

In their petition for rehearing, the Companies argued that the Commission misapplied *Illinois American Water Co*., 2011 IL App (1st) 101776, to the instant docket, because the Commission's request for more detail on the attorneys' fees sought to be recovered by the Company in that case is not applicable to non-attorney employees. Petition for Rehearing at 5-6. The Companies' argument misses the mark. The Court, in reviewing the rate case expenses subject to Section 9-229 included the utility's requested recovery of attorney's fees as well as other consultant fees. See *Illinois American Water Co*., 2011 IL App (1st) 101776 at ¶41. Further, the plain language of section 9-229 refers to "technical experts" in addition to "attorneys." 220 ILCS 5/9-229. Clearly, the intent of the legislature, and the clear mandate of the Appellate Court, indicate that section 9-229 is intended to review recovery of expenses related to the rate case activities of non-attorney employees.

The Companies also relied upon *Citizen Utilities* to argue that the Commission could not change an evidentiary standard without sufficient notice and a reasonable amount of time to meet the new standard. Even if the People had not demonstrated that *Citizens Utilities* is not applicable to this docket, the Commission did, in fact, provide reasonable notice and opportunity to the Companies to respond via this rehearing docket. The Companies opted not to meaningfully respond, despite being given the opportunity to do so. Moreover, as noted above, the Commission is not, "on its own accord" establishing a new standard. See Companies Application for Rehearing at 4. As argued above, the Commission was given a directive from the Appellate Court (and the legislature) to conduct a meaningful review that includes the analyses described above. Therefore the Commission should reject the Companies' arguments.

Given the lack of evidence provided by the Companies, the unsupported legal argument presented in defense of their refusal to produce meaningful evidence, and the excessive amount

of hours requested to be recovered, the People urge the Commission to affirm its order from the original hearing and reject the Companies' efforts to "get something for nothing."

VI. CONCLUSION

WHEREFORE, the People of the State of Illinois urge the Commission to reject the Companies' request to recover internal rate case expenses for the reasons stated above, and request that the Commission leave its May 22, 2012 decision on internal rate case expense unchanged.

Respectfully submitted,

The People of the State of Illinois
by LISA MADIGAN, Attorney General

/s/ Timothy S. O'Brien

Susan L. Satter
Senior Assistant Attorney General
Timothy O'Brien
Assistant Attorney General
Public Utilities Bureau
100 W. Randolph St., 11th Floor
Chicago, IL 60601
Telephone (312) 814-1104 (Satter)
Telephone (312) 814-7203 (O'Brien)
Fax (312) 814-3212
Email: ssatter@atg.state.il.us
Email: tsobrien@atg.state.il.us

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